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October 14, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: May 25, 2004

Case No.: TIA-0100

XXXXXXXXXXXXXXXXX the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of his deceased father, XXXXXXXXXXXX. The DOE Office of Worker Advocacy determined that the applicant's deceased father was not a DOE contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers'

compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3).

The DOE program is specifically limited to DOE contractor employees¹ who worked at DOE facilities.² The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.³

Pursuant to an Executive Order,⁴ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physicians Panel Process. The Physicians Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

¹ A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

² A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

³ See www.eh.doe.gov/advocacy.

⁴ See Executive Order No. 13,179 (December 7, 2000).

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physicians Panel because the office determined that the applicant's deceased father did not meet the eligibility requirements for the Physicians Panel Process. *See* May 7, 2004 letter from the DOE Worker Advocacy Office to the applicant.

In the original application that he filed with the Office of Worker Advocacy, the applicant stated that his deceased father worked as a laborer and maintenance worker at the E.I. DuPont Chambers Works plant (Dupont Deepwater Works) in Deepwater, New Jersey from January 2, 1944 to July 30, 1982. According to the applicant, his deceased father developed stomach cancer as a result of his 38-year exposure to lead, radiation and chemicals while employed at DuPont Deepwater Works. In his appeal, the applicant argues that his deceased father had an identifiable illness that was work-related. He further contends that the DuPont Deepwater Works site "was contracted by DOE," and that the DOE is a "third-party to our claim." For all these reasons, the applicant believes that he should be able to avail himself of the DOE's Physician Panel Process.

III. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE Physician Panel Process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE Physician Panel Process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE Physician Panel Process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the Physician Panel Process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee, *i.e.*, an individual who is or was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). Under the EEOICPA, a worker who was employed by an Atomic Weapons Employer or a Beryllium Vendor is not eligible to use the DOE Physician Panel.

To determine whether the worker in question was a DOE contractor employee under the applicable statute and regulations, we consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, DuPont Deepwater Works in Deepwater, New Jersey is listed as "AWE" for the period 1942-1949 and "DOE" for the year 1996. The

codes “AWE” and “DOE” denote “atomic weapons employer facility”⁵ and “DOE facility,” respectively. We next reviewed the Office of Worker Advocacy web site for additional information. There, we learned a number of facts about the facility in question. www.eh.doe.gov/advocacy (DuPont Deepwater Works entry in searchable database on sites). In the 1940s, DuPont Deepwater Works produced uranium products and conducted research on uranium hexafluoride at the facility. DuPont Deepwater Works conducted these activities first for the U.S. Office of Scientific Research and Development, and later under contract to the Manhattan Engineering District (MED) and the Atomic Energy Commission (AEC). DuPont Deepwater Works also developed processes to convert uranium dioxide to uranium hexafluoride, and produced uranium oxide and uranium metal which was used to fuel the CP-1 reactor at the University of Chicago. After completion of these activities, the AEC conducted limited decontamination and released the site to DuPont Deepwater Works for reuse. DuPont Deepwater Works currently operates a chemical plant at this site. According to the web site, the only year in which actual remediation was performed under contract with the DOE was 1996.

Based on the available evidence, we conclude that the applicant’s deceased father was not a DOE contractor employee. There is no information that we found that would allow us to conclude that DuPont Deepwater Works was a DOE facility at any time between 1944 and 1982. Neither the DOE nor its predecessors ever had a propriety interest in DuPont Deepwater Works. Moreover, we found no evidence that DOE or its predecessors ever entered into a contract during the period 1944 to 1982 with any entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services at DuPont Deepwater Works.⁶ As noted above, the only year that the DOE entered into a contract with an entity to provide environmental remediation services at DuPont Deepwater Works was in 1996, 14 years after the applicant’s late father left DuPont Deepwater Work’s employ. For these reasons, we conclude that the applicant’s deceased father (1) did not work at a DOE facility and (2) was not employed by a “DOE contractor” as that term is defined in the applicable statute and regulations.

We reiterate that our decision regarding the applicant’s ineligibility in this case does not affect his eligibility for (i) state workers’ compensation benefits or (ii) federal monetary and medical benefits under other statutory provisions, including EEOICPA claims at the Department of Labor.⁷

⁵ An “Atomic Weapons Employer Facility” is defined as a facility, owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. EEOICPA, 42 U.S.C. § 73841(5).

⁶ The DOE’s records show that the Dupont Deepwater Works facility was an Atomic Weapons Employer for a portion of the time that the applicant’s deceased father worked at the facility, i.e., 1944-1949.

⁷ As noted earlier in this Decision, the Department of Labor administers the EEOICPA program which provides federal monetary and medical benefits to, among others, workers who were employed by Atomic Weapons Employers who developed radiation-induced cancer.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0100 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 14, 2004